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Nos. 344, 346, 356, 359, 468
441 Misc., 492 Misc.

In the Supreme Court of the United States

OCTOBER TERM, 1963

JOHN ORMENTO ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	2
Jurisdiction	2
Statute involved	2
Questions presented	3
Statement	4
Argument:	
1. The evidence	21
2. Disorderly conduct of defendants	25
3. Measures taken by trial court to maintain order	31
4. Alleged denial of right to counsel	32
5. Joinder of substantive and conspiracy counts	34
6. Testimony by United States Attorney	36
7. Suppression of evidence	38
8. Sciremammano indictment	38
9. Wiretapping	39
10. Charge to the jury	40
Conclusion	42

CITATIONS

Cases:	
Caminetti v. *United States*, 242 U.S. 470	22
Costello v. *United States*, 350 U.S. 359	39
Dowling v. *United States*, 249 F. 2d 746	28
Fernandez v. *United States*, 5 L. Ed. 2d 683, 81 S. Ct. 642	6
Glasser v. *United States*, 315 U.S. 60	22
Hernandez v. *United States*, 300 F. 2d 414	23
Jones v. *United States*, 362 U.S. 257	38
Opper v. *United States*, 348 U.S. 84	28

Cases—Continued

	Page
Paoli, Delli v. *United States*, 352 U.S. 232	30
Toliver v. *United States*, 224 F. 2d 742	23
United States v. *Agueci*, 310 F. 2d 817, certiorari denied *sub nom. Guippone* v. *United States*, 372 U.S. 959	23
United States v. *Aviles*, 274 F. 2d 179, certiorari denied, 362 U.S. 974	29
United States v. *Bentvena*, 288 F. 2d 442	5, 32
United States v. *Bentvena*, 304 F. 2d 883	27
United States v. *Bentvena*, 319 F. 2d 916	5
United States v. *Galante*, 298 F. 2d 72, certiorari denied *sub nom. Mirra* v. *United States*, 371 U.S. 927	6
United States v. *Jones*, 308 F. 2d 26	23
United States v. *Haupt*, 136 F. 2d 661	28
United States v. *Malfi*, 264 F. 2d 147, certiorari denied, 361 U.S. 817	23
United States v. *Massiah*, 307 F. 2d 62	41
United States v. *Morello*, 250 F. 2d 631	24
United States v. *Panico*, 308 F. 2d 125, pending on certiorari, No. 45, this Term	28
United States v. *Santore*, 290 F. 2d 51, certiorari denied *sub nom. D'Aria* v. *United States*, 365 U.S. 834	23
United States v. *Schaffer*, 362 U.S. 511	28
Wong Sun v. *United States*, 371 U.S. 471	38

Statutes:

21 U.S.C. 173	4
21 U.S.C. 174	2, 4

Miscellaneous:

Federal Rules of Criminal Procedure: Rule 14	27

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No. 346
CARLIE DI PIETRO, PETITIONER
v.
UNITED STATES OF AMERICA

No. 356
JOSEPH FERNANDEZ, PETITIONER
v.
UNITED STATES OF AMERICA

No. 359
CARMINE PANICO, PETITIONER
v.
UNITED STATES OF AMERICA

No. 468
CARMINE GALANTE, PETITIONER
v.
UNITED STATES OF AMERICA

No. 441 Misc.
FRANK MANCINO, PETITIONER
v.
UNITED STATES OF AMERICA

No. 492 Misc.
SALVATORE SCIREMAMMANO, PETITIONER
v.
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 1963. Petitions for rehearing on behalf of petitioners Ormento (No. 344) and Galante (No. 468) were denied on July 16, 1963. The petition in No. 344 was filed on August 12, 1963. In No. 468, the time to file a petition was extended to September 14, and the petition was filed on September 13. As to the others, the time to file a petition was extended to August 12 and the petitions were filed before that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

21 U.S.C. 174 provides as follows:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less

than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

QUESTIONS PRESENTED

All petitioners except di Pietro (No. 346) and Galante (No. 468) state that they adopt, insofar as applicable, the questions presented in companion petitions for certiorari. These questions are as follows:

1. Whether the evidence sustained petitioners' convictions of conspiracy to import narcotics, in violation of 21 U.S.C. 174 (raised in Nos. 344, 356, 359).

2. Whether the disorder created by the persistent misconduct of some of the defendants requires reversal of petitioners' convictions (raised by all petitioners).

3. Whether the trial court properly dealt with such misconduct (raised by all petitioners).

4. Whether the trial court properly ruled as to the appointment and withdrawal of counsel (discussed in Nos. 359, 468 and 441 Misc.).

5. Whether substantive and conspiracy charges were properly joined (discussed in Nos. 344, 441 Misc. and 492 Misc.).

6. Whether the United States Attorney properly testified in anwer to charges that he had suborned perjury (discussed in No. 344).

7. Whether the trial court properly refused to suppress evidence (raised in No. 344).

8. Whether the indictment of Sciremammano was invalid on the ground that no evidence connecting him with the offense had been heard by the grand jury (raised in No. 492 Misc.).

9. Whether government evidence was secured by wiretapping (raised in No. 468).

10. Whether the trial court properly instructed the jury (discussed in Nos. 344 and 359).

STATEMENT

An indictment returned in the United States District Court for the Southern District of New York charged twenty-nine persons, including petitioners, with illegal importation of narcotic drugs and conspiracy, in violation of 21 U.S.C. 173, 174 (R. 9159–9176).[1] Following an abortive trial, several defendants were severed on motion of the government (R. R, JJ). The case then went to trial against petitioners and seven codefendants. At the conclusion of all the evidence, the trial court acquitted one code-

[1] "R." refers to the record in the court of appeals, "Tr. 1st trial" to the transcript on the first trial, "Pre-trial Tr." to the transcript of proceedings before the second trial, "Tr." to the transcript of the second trial, and "Tr. sealed" to the portions of that transcript sealed by order of the court.

fendant. The jury found the remaining defendants guilty as charged. Petitioner Ormento was sentenced to imprisonment for forty years and a fine of $20,000, Fernandez to thirty-five years, Galante to twenty years and a fine of $20,000, di Pietro and Mancino to twenty years, and Carmine Panico and Sciremammano to twelve years (R. SS–TT). The court of appeals affirmed the foregoing convictions. It also reversed and remanded the conspiracy conviction of another defendant (Salvatore Panico), reversed outright the conspiracy conviction of three other defendants (Bentvena, Monastersky and Struzzieri), and reversed and remanded (Judge Moore dissenting) the convictions of the latter three on substantive charges. *United States* v. *Bentvena*, 319 F. 2d 916.

1. The events which took place at the second trial, and are the chief subject matter of the petitions, had their genesis in the first trial. The commencement of the trial was delayed one week by absconding of defendant Tuminaro. Its progress was further retarded by a succession of events including the claimed illnesses of defendants Ormento and Petillo, the default of defendant Sancinella, the claimed illness of Sancinella's counsel, the refusal of Sancinella to accept court-appointed counsel, the claimed illness of defendant Bentvena, and a claimed injury of defendant Struzzieri in an automobile accident occurring in suspicious circumstances. Judge Levet thereafter ordered that all defendants be remanded. This action was affirmed by the court of appeals. *United States* v. *Bentvena*, 288 F. 2d 442, 446 and bail was denied

by Mr. Justice Harlan. *Fernandez* v. *United States*, 5 L. Ed. 2d 683, 81 S. Ct. 642. However, despite the continued efforts of Judge Levet over a period of almost six months to prevent the trial from collapsing, injuries under mysterious circumstances to the foreman of the jury when the trial was nearly concluded forced the declaration of a mistrial (R. R., Tr. sealed 175–177). A number of defendants, including petitioners Galante, di Pietro, Sciremammano, Ormento and Panico were subsequently found guilty of contemptuous conduct during the course of the trial. *United States* v. *Galante*, 298 F. 2d 72, certiorari denied *sub nom. Mirra* v. *United States*, 371 U.S. 927.

Prior to the declaration of the mistrial, which occurred on May 15, 1961, Judge Levet announced, after consultation with the chief judge, that there would be an immediate retrial of the case (Tr. 1st trial 14,426). Beginning the following month, the case appeared at regular monthly intervals on the trial calendar and was adjourned because of claimed inability of various defendants to obtain counsel (Pre-trial Tr. 75). Faced with these continuing difficulties, Judge Murphy "sensed that the failure to retain counsel was part of a plan to postpone trial" and ordered defendants to obtain counsel by September 5 or to be subject to possible penalties for contempt (R. DD, 10.705). However, after repeated failures to obtain counsel, Judge Murphy eventually refused, because of lack of precedent, to find defendants in contempt and held that "the better practice is to assume, in the absence of a request that counsel be assigned, that the defendant

has waived his right and will appear at trial *pro se.*" (R. EE, Tr. 10,704–10,706).

Thereafter, on motion of the government and over objection by the defense, a number of defendants were severed (R. FF, GG; Pre-trial Tr. 8, 37–38, 57–62). On March 9, counsel had either been retained by or appointed for all the remaining defendants, and Judge MacMahon set the case for trial on March 19 (Pre-trial Tr. 15). At that time he stated that he would do his best to see both that every defendant received a fair trial and that another mistrial was avoided, and to that end would be strict with the parties and attorneys (Pre-trial Tr. 30).

On March 12, after several delays in making his appearance, Mr. Albert C. Aronne, counsel for Salvatore and Carmine Panico, asked leave to withdraw. He told the court that his previous appearances in their behalf had been made only for the purpose of answering the trial calendar until such time as they could retain Mr. Jerome Lewis, who had represented them at the first trial. The court denied the request for withdrawal and, overruling Mr. Aronne's plea that he was not a member of the bar of the court, ordered his admission (Pre-trial Tr. 66–76a).

On March 29, after the commencement of the trial had been further delayed, Mr. Aronne informed the court that he had been forced to go to trial in a State case, but would obtain substitute counsel (Pre-trial Tr. 579–590). When he failed to do so, the court on April 2 appointed Mr. George Todaro to represent the two Panicos and codefendant Loiacano, whose attorney,

709-363—83——2

Mr. Sylvester Cosentino, was reportedly in the hospital with a heart condition. All three defendants objected to the appointment (Pre-trial Tr. 616–617). At the same time, Mr. Nicholas P. Ianuzzi was endeavoring to withdraw as attorney for Galante in favor of Miss Frances Kahn. The court stated that Miss Kahn would be permitted to appear as co-counsel, but declined to relieve Mr. Ianuzzi of his representation. Mr. Ianuzzi declared, "If I am needed, in case any time she may not be able to come, I will be here" (Tr. 55).

At a closed hearing, the minutes of which were sealed in order to avoid possible prejudice through newspaper publicity, the government requested that all defendants be remanded to custody. The court granted the government's request (Tr. sealed 175–177).[2]

There were also extensive hearings before the commencement of the second trial as to the claimed mental incapacity of defendant Mari, a matter decided adversely to the defendant (R. HH, JJ; Pre-trial Tr. 417–577, 591, 597a, 610).

2. With respect to petitioners, the principal government witness at the second trial was Edward Lawton Smith, a Canadian member of the conspiracy, who had earlier served two terms of imprisonment for breaking and entering. Smith testified that petitioner Mancino, with whom he was acquainted, met

[2] The record of the trial submitted by petitioners does not include the matter sealed by the court in order to avoid possible prejudice by publication thereof. These sheets appear as "Separate Sheets Deleted by Trial Court and Sealed for Court of Appeals" in the record of this trial lodged by the government in *Salvatore Panico* v. *United States*, No. 45, this Term.

him in Montreal in April 1957 and invited him to make a "run" with him to New York. They then drove to an apartment in Montreal, where petitioner Galante gave Mancino a valise containing some cellophane bags of white powder. As they were leaving the apartment, severed defendants Cotroni and Vecchio entered (Tr. 1440–1453). Smith and Mancino then left Canada and drove to Brooklyn, where Mancino got off at Frank's Bar and Grill, taking the valise with him (Tr. 1454–1459).

Smith had numerous contacts with Mancino thereafter, frequently driving a route for Mancino which started at Frank's Bar and Grill and included the Vivere Bar, the Squeez-Inn and the 1717 Club, where packages would be left. On one of these occasions, Mancino introduced Smith to codefendant Mari and petitoner di Pietro at the Vivere Bar (Tr. 1477–1480). Mancino introduced Smith to petitioner Sciremammano at the Squeez-Inn and to Salvatore Panico and Carmine Panico at the 1717 Club. Packages were delivered to these petitioners at both places (Tr. 1481–1485). Other deliveries were made at frequent intervals along this route (Tr. 1460–1463, 1464–1468).

Smith also told of a trip to Canada with di Pietro, Mancino and two others. Di Pietro had $17,000, which he temporarily divided among the others, with the explanation that it would be less likely to cause trouble if they were stopped at customs (Tr. 1515–1516). When they arrived in Montreal, di Pietro met with Cotroni. When di Pietro asked why he had been cut off, Cotroni told him he was always "pulling

up short". Even though di Pietro turned over the money he had brought, Cotroni told him that in the future he would be on a cash basis (Tr. 1520–1523). On the return trip, Mancino told Smith that they had a "load". They stopped at the Vivere, the Squeez-Inn and the 1717 Club before going back to Frank's (Tr. 1526).

About the middle of May 1958, di Pietro introduced Smith to codefendant Mirra, who later introduced Smith to severed defendant Petillo and petitioner Fernandez (Tr. 1574–1575). Petillo in turn introduced Smith to Tumminaro, who asked Smith to make runs for them between Canada and New York, saying that Smith could make from $100,000 to $140,000 a year. Smith replied that he was not interested (Tr. 1580–1584). The same proposal was later made on behalf of Sancinella and Loicano by Mancino. Through Mirra, Smith also met petitioner Ormento, whom Mirra described later as his boss. Ormento asked Smith why he had been turning down "these offers we have been offering you" (Tr. 1596–1597, 1606–1609, 1612–1613, 1625).

In early June 1958, Smith met Mirra and Fernandez at the Stable, a restaurant operated by Mirra. Fernandez removed an attache case from the trunk of his car and give it to Mirra. Mirra was then driven by Smith to the Saxony Restaurant. When Smith asked Mirra to let him in on what was going on, Mirra said they were making a run and showed him two cellophane bags of white powder in the case. After Mirra had taken the case inside the restaurant and returned, he showed Smith two big bunches of money, saying, "This is the way to make the loot, kid". They

returned to the Stable, where Mirra gave the case to Petillo, who was standing on the sidewalk with petitioner Fernandez (Tr. 1619–1624).

Approximately the second week of June, Smith and Mirra met Ormento, who told Mirra to take a package to Marconi's Restaurant but then told Smith to take it. They made the delivery and Ormento paid Smith five hundred dollars, which he divided with Mirra (Tr. 1626–1631).

Shortly after the middle of June, Smith met Mirra, Fernandez and Petillo in the basement of Mirra's restaurant. Petillo asked Smith about his connection with Cotroni in Canada. He suggested that they go into business on their own, with Smith getting the narcotics from Canada. Petillo said that he could come up with his part of the money, Mirra could borrow some on his restaurant and that somebody owed Fernandez a favor. Smith was agreeable and Petillo said that they would let him know when they were set up (Tr. 1637–1643). On another occasion, shortly afterward, Fernandez summoned Smith and Petillo to a meeting with petitioner Galante and Tuminaro (Tr. 1651–1652).

Late in June, Smith, Mirra and one Joe Curtis met Galante on 56th Street. Galante told Mirra, "It is over in that car there." Mirra and Smith took a suitcase out of the back of the car. Galante gave Smith ten $100 bills. Mirra and Smith then delivered the suitcase to Ormento in a room at the Park Sheraton Hotel. Ormento opened it and found it to be full of cellophane bags containing white powder. Ormento said it was all right and took charge of the suitcase (Tr. 1653–1655).

Thereafter, Smith was arrested and turned over to the immigration authorities (Tr. 1656–1658). Upon his release, he returned to the same hotel at which he had previously been staying, a decision which was criticized by Mirra on the ground that the officers could check on Smith. When Smith disregarded the complaint that he had everybody worried, Mirra told him that if he didn't move out, he would wind up behind a truck—"[i]f Carmine gives the order, John will have to carry it out" (Tr. 1660–1663).

Smith thereafter worked with the Bureau of Narcotics. He told Mancino that he was going into the junk business and introduced agent Biase as his partner (Tr. 1664). Later, he took Biase to Montreal and introduced him to Cotroni. After overcoming Cotroni's reluctance, he purchased two kilos of heroin for $13,000 (Tr. 1779–1783). Cotroni also turned over two more kilos on consignment (Tr. 1779–1783). In their negotiations, Cotroni spoke of the high grade of the narcotics which he sold. He told Smith and Biase that when he tested one of the bags he marked an "X" on the tape placed over the bag and that whenever they saw that mark they could know that it was his stuff and that it tested out well (Tr. 1782). Cotroni also mentioned the seizure at Hicksville and said that his stuff had gone to Tuminaro and di Pasqua (Tr. 1690, 3203).

Evidence, reviewed in detail in the opinion below, showed that heroin supplied by Cotroni and bearing his distinctive marking was distributed in the New York area through defendants Tuminaro, di Pasqua, Orlandino, Monastersky, Bentvena, and Struzzieri. In this connection, narcotics and other evidence seized

in various raids including a raid at Hicksville, New York, were introduced in evidence.[3]

Agent Biase corroborated in detail Smith's account of their dealings with Cotroni (Tr. 3189–3248). Three members of the Royal Canadian Mounted Police testified to surveillance of Smith, Biase and Cotroni while they were negotiating in Canada (Tr. 3521–3545).

Moreover, heroin and narcotics paraphernalia were seized at 1226 East 18th Street, premises occupied by severed defendant Gellman, following delivery of heroin by Gellman to petitioner di Pietro (Tr. 4824–2837).

3. A succession of interruptions impeded the progress of the trial. On the first day, April 2, 1962, defendant Salvatore Panico demanded, in the presence of the jury, "Do these people know I don't have a lawyer? What is this Russia?" He continued in the same vein, disregarding the court's direction to sit down (Tr. 58–59; Govt. Br. in Opp., *Panico* v. *United States*, No. 45, this Term, 6–7). A few minutes later, Loicano made a vocal protest before the jury that Mr. Todaro, appointed by the court to represent him until his chosen counsel, Mr. Consentino, who had gone to the hospital the day before, should return to the trial, did not represent him (Tr. 70). Salvatore Panico

[3] While the court of appeals reversed the convictions for conspiracy and reversed and remanded the convictions on substantive charges of Monastersky, Bentvena and Struzzieri on the ground that their participation in the conspiracy appeared only by the declarations of co-conspirator Cotroni (that the Hicksville raid involved his narcotics and that narcotics marked in a particular manner came from him), the court of appeals did not hold that these declarations, which connected the substantive transactions with the Canadian-American conspiracy, were inadmissible as against petitioners.

had another outburst before the jury, saying to Mr. Todaro, "I don't want to talk to you" (Tr. 123).

On April 4, the court ordered that the two rows back of the defendants be kept clear of spectators (Tr. 308). On April 11, defense counsel objected to roping off four rows of spectators' seats. The court explained that it wished to avoid any incidents between spectators and defendants and also to foreclose accusations that people from the United States Attorney's office, who were frequently coming in and out of the courtroom, might be eavesdropping on defendants. The ropes, the court stated, had proved necessary because of constant infiltration of spectators. However, on defense urging, the ropes were ordered removed (Tr. 1355–1358).

On April 12, petitioner Sciremamanno interrupted the testimony of government witness Smith to ask him why he did not stop lying. The court instructed the jury to disregard the incident and announced its intention to ignore any outbursts unless they interfered with an orderly trial (Tr. 1481–1482). Later, in chambers, the court advised counsel to control their clients (Tr. 1529).

On April 13, Loicano and Struzzieri interrupted Smith's testimony and accused him of lying. The court told the jury to disregard the outburst (Tr. 1558). Later Monastersky interjected, "Smitty, your story is mixed up", a remark which the court ignored (Tr. 1655–1656).

On April 16, it was reported that petitioner Sciremammano had tripped on a stairway and suffered the possible fracture of a vertebra (Tr. 1727–1729, 1736). Later, Sciremammano was reported to have

refused to leave the hospital, although all examinations were negative. The court directed that he be brought in. After hearing an account of the accident, the court concluded that there was every indication the fall was deliberate (Tr. 1753). The court denied an adjournment, pointing out that a day had already been lost on this account (Tr. 1760). After Sciremammano had been brought in, a request on behalf of the other defendants for adjournment was denied (Tr. 1764–1766). His attorney thereafter reported to the court that Sciremammano was either unconscious or sleeping and renewed his motion for adjournment. Out of hearing of the jury, the court said, "It is a fake from the word go, if I am any observer of what human conduct is, and I deny your motion. * * * It is a put-up job from start to finish" (Tr. 1776–1777). In the face of renewed efforts by counsel to secure an adjournment, the court commented that it was surprised by counsel's earlier statement that Sciremammano was unconscious, since the court had observed him to be completely alert and responsive (Tr. 1810–1811). A doctor's report indicated that this petitioner's only injury was muscle strain and that he was capable of standing trial (Tr. 1889–1895).

On April 18, after Mirra had joined a sidebar conference (Tr. 1993–1994), the court again warned counsel about interruptions by defendants. When it was reported that Struzzieri was sick, the court held no session that afternoon (Tr. 2005–2009). Thereafter, in chambers, the court denied a motion by Mirra to discharge his attorney (Tr. 2022–2026).

709-363—63——3

On April 24, Mr. William N. Tendy, Assistant United States Attorney, notified the court that petitioner Galante was addressing insulting remarks to him, calling him a "degenerate." Miss Kahn denied this occurrence (Tr. 2191). Later, the court noted that Galante was murmuring something about "liar" (Tr. 2214). Mr. Albert Rosenthal, attorney for defendants Mari and Struzzieri, referred to witness Smith as a "smart aleck" and an "ex-convict" and was asked by the court to discontinue such belligerent comments (Tr. 2204, 2316). A request by Sciremammano to attend his aunt's funeral was denied by the court unless Sciremammano was willing to have the trial continue in his absence (Tr. 2617–2620).

On May 1, protest was made that extra marshals were present in the courtroom. The court explained that five had been added after Ormento had broken away from the marshals and, shouting threats and obscenities, had pounded on the door of the robing room while the court was inside conferring with counsel. Motions for mistrial were denied. Ormento's counsel urged that his action was caused by the terrible pain he was suffering because of his teeth. Mr. Tendy advised that it was only a problem of adjusting his plates. The court made arrangements for him to be taken out to see his regular dentist (Tr. 3253–3256, 3125–3129). Mirra complained in the presence of the jury that one of the marshals had been hitting him; his attorney maintained that Mirra's conduct was attributable to his mental condition (Tr. 3497).

The disorder created by the defendants became increasingly violent during the presentation of their

evidence. On May 23, Salvatore Panico got away from the marshals and entered the jury box, pushing some of the jurors and screaming that other defendants were junk pushers. He was seconded by his brother Carmine, who addressed his vilification to the court (Tr. 5638–5639; Govt. Br. in Opp., *Panico* v. *United States*, No. 45, this Term, 7). The court instructed the jury to disregard this conduct and excused them for the rest of the day to hear defense motions for mistrial (Tr. 5640–5662).

On the following day, Mr. Aronne asked for a psychiatric examination of both Panicos (Tr. 5679). The court warned defendants against any further outbursts. Later Mirra interrupted the testimony of a defense witness and Salvatore Panico joined in, referring to other defendants as "pushers." Both were removed from the courtroom, after which the usual motions for mistrial were made (Tr. 5706–5708). At the close of the day's session, as the court was giving its usual admonition to the jury, Struzzieri interrupted to tell the jury to disregard what Panico and everyone else had said. He also told the judge he must have been in a hospital. The court ordered his removal, instructing the jury, as was customary after such outbursts, that they must put these extraneous episodes out of their minds and determine the guilt or innocence of the defendants solely in accordance with the evidence (Tr. 5689).

The next morning, the court directed Mr. Aronne to keep Panico under control and advised him that "part of that begins with your showing respect to this Court" (Tr. 5884). Soon afterward, Panico interrupted a defense question to charge that di Pietro was

a convicted dope pusher. Petitioner di Pietro interrupted, "Stop him, I told you, Al." Making no effort to restrain di Pietro, and without asking that the jury be excused, Mr. Albert Krieger (di Pietro's counsel) was on his feet requesting a mistrial for di Pietro, saying, "He cannot get a fair trial here. Yesterday I asked for an examination of this defendant Panico. Your Honor, this is impossible. I am too upset to say anything about this. I don't know how I can defend my client under these circumstances." The court answered, "Your motion for a mistrial is denied, Mr. Krieger. Mr. Krieger, it is obviously a put-up job." This was followed by additional motions for mistrial and di Pietro's further contribution: "Every one of my witnesses, he made a holler." The court admonished the jury to ignore these interjections and excused them (Tr. 5889–5890).

Di Pietro then proclaimed that if Salvatore Panico came into the courtroom while he was there, he would strangle him and that the judge should "chain him down, if you got to." Mr. Krieger asked leave for di Pietro to address the court. When the request was denied, di Pietro repeated, "Yes, I will strangle him myself, I will get him out of the courtroom." (Tr. 5890–5893).[4]

Upon the resumption of testimony, Salvatore Panico interrupted a defense witness to ask when he was going to tell the jury that "Galante was in the Apalachin meeting with all the top hoods in the country". The court ordered that he be removed

[4] The court thereafter ordered a psychiatric examination of Salvatore Panico, which, together with the hearings, delayed the trial of the case for three days (Tr. 5895–6043).

from the courtroom and that he be gagged when he was brought back. Carmine Panico told the court, "You better gag me, too." The court ordered that this be done. Mr. Aronne objected that there had been no outburst by Carmine; to which the court replied that Carmine had threatened that there would be and that this could not be tolerated (Tr. 6088). The gags consisted of a strip of cloth across the mouth, nothing being inserted inside the mouth (Tr. 7375). When the two Panicos were returned to the courtroom, the court instructed the jury to disregard their outbursts and their present physical appearance, and that the case was to be judged solely on the evidence (Tr. 6091–6092). Shortly afterward, Salvatore Panico created another disturbance before the jury, slamming the table and pointing at Galante. This was followed by further motions for mistrial (Tr. 6106).

Later, Carmine Panico took the stand in his own behalf (Tr. 6320–6336). The court noted that he apparently made a good impression on the jury and, upon his promise to behave, ordered that the shackles and gag not be put on again (Tr. 6337–6338).

Codefendant Mirra later took the stand in his own behalf. Twice he referred to co-defendants as "junk pushers", and both times there followed motions for mistrial (Tr. 6434–6435). Then, during cross-examination as to a previous conviction, Mirra threw the witness chair at the Assistant United States Attorney, narrowly missing him, but striking the jury box and shattering the chair. Again, motions for mistrial ensued. The court denied the motions but placed the same physical restrictions on Mirra which he had pre-

viously imposed on the Panicos (Tr. 6462–6463; Govt. Br. in Opp., *Mirra* v. *United States*, No. 389 Misc., O.T. 1962). The court assured Mirra's attorney that it was sure that he had had nothing to do with the occurrence (Tr. 6464).

Shortly thereafter, Mr. Tendy complained that Galante had called him another obscene name. Miss Kahn again denied the allegation (Tr. 6465). That afternoon, Mirra's counsel claimed that, as a result of medication, Mirra had fallen asleep (Tr. 6496–6498, 6509), and that he could not remember what the witnesses had said (Tr. 6511). The following day it was claimed that Mirra was in a fog because of medication (Tr. 6603–6604, 6524). Salvatore Panico then made similar claims that he was drugged and that he could not understand what was going on (Tr. 6524).

On June 11, Monastersky's attorney informed the court that his client had fallen in the shower and injured his arm. As to him, too, it was claimed that the medication had made him groggy and unable to follow the trial (Tr. 7375–7379). Further claims of a similar nature were made throughout the week (Tr. 7767–7769, 7837, 7839). The judge remarked that if counsel would tell him who was to have the next turn, he could perhaps take precautions against it (Tr. 7376).

The following morning, Miss Kahn, Galante's attorney, was reported to be in the hospital from a fall. Since Mr. Ianuzzi had been excused from active attendance on behalf of Galante only on condition that he return if needed (*supra*, p. 8), the court called him in. When Mr. Ianuzzi expressed reluctance, the

court directed him to represent Galante, on pain of contempt (Tr. 7415–7419). Monastersky then appeared in court with his arm in a sling. The x-rays were negative (Tr. 7419–7421).

On June 15, Mr. Ianuzzi developed pains in his chest and went to a hospital (Tr. 7956–7957). Medical checkups, however, revealed nothing wrong with either him or Miss Kahn (Tr. 8083). The court then appointed Mr. Kenneth O'Connor, whom Galante had earlier consulted, to act as his attorney. Galante continuously objected to his representation. In the course of these objections, Galante called Mr. Tendy "a subornator of perjury" and said that they would get him some day, but that the judge wouldn't get him (Tr. 8031–8036, 8204–8206). At the time Miss Kahn absented herself from the trial, she took with her the Galante exhibits, which she refused to give up (Tr. 8427–8429). Galante instructed his various counsel not to talk with each other or to turn over the exhibits (Tr. 8883).

ARGUMENT

1. THE EVIDENCE

The sufficiency of the evidence, challenged by petitioners Ormento (No. 344), Fernandez (No. 356) and Carmine Panico (No. 359), was carefully considered by the court below and merits no further review. It is true that the convictions rested chiefly upon the testimony of Smith, which was uncorroborated as to the matters specifically involving these petitioners. In the federal courts, however, there is no requirement that the testimony of an accomplice be cor-

roborated. *Caminetti* v. *United States*, 242 U.S. 470. Any doubt as to Smith's credibility[6] was resolved in his favor by the jury, whose determination is final if there is substantial supporting evidence. *Glasser* v. *United States*, 315 U.S. 60, 80. It may be noted, finally, that Smith's testimony as to occurrences subsequent to his employment by the Narcotics Bureau was corroborated in detail by Agent Biase.

(a) One important piece of evidence against Ormento was Smith's testimony that two persons (Tuminaro and Mancinio) had offered him handsome sums of money to make narcotics "runs" from Montreal to New York, and that Ormento had later asked him why he had been "turning down these offers we have been offering you" (*supra*, p. 10). With reference to this testimony, Ormento contends that he was convicted solely on declarations of co-conspirators and that there was no independent evidence of his participation in the conspiracy. That contention is groundless. In the first place, it rests upon the mistaken premise that the "offers" described by Smith constituted hearsay as against Ormento. The proposals made to Smith, however, were not declaratory statements; they were verbal acts, and as such were ad-

[6] It was developed on cross-examination that Smith had received rewards of $5,000 both from Canada and from the United States, had been working as a special employee for the Narcotics Bureau, had made statements contradictory to his present testimony at the time of his arrest and appearance before the immigration authorities, and had conceded that "If the fear is great enough, I'll lie" (Tr. 3074, 3132, 3149–50, 3175).

missible notwithstanding the hearsay rule. In themselves, moreover, they had no tendency to incriminate Ormento. It was only Ormento's own colloquy with Smith, in effect "adopting" the prior offers, which implicated Ormento.

Furthermore, there was other evidence linking Ormento to the conspiracy. The record shows that on one occasion Smith and Mirra, at the direction of Ormento, delivered a package to Marconi's restaurant, in return for which they were paid $500 (*supra*, p. 11). In another instance, Mirra and Smith, pursuant to Galante's orders, delivered a suitcase to Ormento and another party at the Sheraton Hotel. The suitcase, opened by Ormento, contained cellophane packages of white powder (*supra*, p. 11). The circumstances were sufficient in both cases to support an inference that the substance transported was narcotics.[6] *United States* v. *Agueci*, 310 F. 2d 817, 828 (C.A. 2), certiorari denied *sub nom. Guippone* v. *United States*, 372 U.S. 959; *Toliver* v. *United States*, 224 F. 2d 742

[6] It should be added that in both episodes Ormento exercised dominion over the narcotics sufficient to establish possession and therefore to support the statutory presumption of knowledge of their illegal importation. *United States* v. *Santore*, 290 F. 2d 51, 76 (C.A. 2), certiorari denied *sub nom. D'Aria* v. *United States*, 365 U.S. 834; *United States* v. *Malfi*, 264 F. 2d 147 (C.A. 3), certiorari denied, 361 U.S. 817; *Hernandez* v. *United States*, 300 F. 2d 114 (C.A. 9); *United States* v. *Jones*, 308 F. 2d 26 (C.A. 2). Indeed, the evidence here was quite sufficient to establish knowledge of the illegal importation even without reliance upon the statutory presumption. Thus, there is no occasion to consider the legal effect, vis-a-vis Ormento, of his co-conspirators' possession of narcotics.

(C.A. 9); *United States* v. *Morello*, 250 F. 2d 631, 633–634 (C.A. 2). And, taken together with the testimony relating to "offers," the two delivery incidents plainly justified the jury's inference of participation in the conspiracy.

(b) The participation of Fernandez was also adequately shown. It was Fernandez who turned over the attache case containing two cellophane bags of white powder, which Mirra, accompanied by Smith, delivered to the Saxony Restaurant in early June 1958 (*supra*, p. 10). He was one of the group which approached Smith about going in the narcotics business for themselves, with Smith as the delivery man from Canada (*supra*, p. 11). While this plan was never consummated, it did show knowledge of the method by which narcotics were being obtained. Fernandez was the man who brought word to Mirra and Petillo that Galante wanted to see them across the street at the Stable. He was shown to have been with Petillo on other occasions (Tr. 1574–1575, 1578–1579, 1644–1648). His course of conduct was such that the jury could reasonably conclude that he was a knowing member of the ring.

(c) The participation of Carmine Panico, his brother's partner in the operation of the 1717 Club, was amply demonstrated. The club was a regular stop on the delivery route of Mancino and Smith. On several occasions when narcotics were delivered and handed to one or the other brothers, both went to the back with it and returned (Tr. 1483–1485, 1555, 1563, 1567–1568). Thus, without reference to what

was said when Smith and Mancino quarreled (see Pet. No. 359, pp. 9–10, 12–14), there was sufficient evidence to show that the two brothers acted together as regular customers of the narcotics ring. The jury had the right to infer that such regular acceptance of narcotics formed a knowing link in the chain of importation and distribution of narcotics.

2. DISORDERLY CONDUCT OF DEFENDANTS

The principal contention advanced by most of the petitioners is that the misconduct of their co-defendants (including other petitioners) denied them a fair trial. Specifically, they urge that the trial court should have ordered the severance of the offending parties and declared a mistrial as to the remaining defendants, *i.e.*, themselves. We submit that the trial court was well within its discretion in rejecting such requests.

It was entirely reasonable for the court to conclude, as it did, that the outbursts which punctuated the trial were part of a concerted effort on the part of many, if not all, of the defendants to bring the proceedings to a halt. The first trial—which began in November 1960 and ended prematurely six months later when the foreman of the jury mysteriously fell down a flight of stairs and broke his back—encountered "every conceivable type of obstruction and interruption" (Ormento Pet. 23a) and resulted in contempt actions against many of the defendants. The retrial was postponed month after month, as first one and then another of the defendants professed

inability to retain counsel. As early as July 1961, Judge Murphy sensed "that the failure to retain counsel was part of a plan to postpone trial." And it was not until April 2, 1962, more than ten months after the conclusion of the abortive first trial, that the second got under way.

The disruptive tactics were immediately resumed. On the opening day of trial, Salvatore Panico eripted, "What is this, Russia?" On May 1, petitioner Ormento broke away from the marshals and screaming threats and obscenities, pounded on the door of the robing room in which the judge was conferring with counsel (*supra*, p. 16). From that point on, the courtroom was in a state of virtual insurrection. Salvatore Panico stormed into the jury box, pushing jurors aside, and hurling epithets at them, the court, and other defendants. Petitioner Carmine Panico called the judge "a lousy bum" and addressed the judge and prosecutor as "you bastards" (Tr. 5639–5639a). Petitioner Di Pietro at one point shouted that he would strangle Salvatore Panico (*supra*, p. 18). Petitioner Galante threatened in open court that he would "get" the Assistant United States Attorney (*supra*, p. 21), Mr. Tendy. Defendant Mirra threw the witness chair at Mr. Tendy, narrowly missing him and striking the jury box. Mirra also joined Salvatore Panico in villifying his co-defendants. Petitioner Sciremammano exhorted the witness Smith to stop lying. On another occasion, Sciremammano, who had fallen down some stairs, refused to leave the hospital and return to court even though the medical report indicated that

his injury was feigned, and the court concluded that the fall was deliberate. And there were many other incidents. Four of the fourteen defendants (the Panicos, Mirra, and Mari) claimed to be insane. Three of them (Salvatore Panico, Mirra, and Monastersky) pretended to be drugged by medication to the point where they could not follow the trial. All except two of the defendants (Fernandez and Mancino) were convicted of contempt at the end of the trial. See *United States* v. *Bentvena*, 304 F. 2d 883 (C.A. 2). In these unprecedented circumstances, the conclusion that the misconduct of the defendants represented a deliberate scheme to provoke a mistrial was virtually irresistible.

Some of the petitioners maintain that if there was such a scheme, they were not parties to it. Even if that be true—and with few exceptions (Mancino, Fernandez and conceivably Di Pietro) the evidence is strongly to the contrary—it was still not incumbent upon the court to sever the unruly defendants or declare a mistrial. As the court of appeals observed (Ormento Pet., p. 28a), a severance of the defendant who perpetrates an outburst would reward his misconduct without erasing the prejudicial effect, if any, upon the remaining defendants. Petitioners urge that the court should at least have ordered the severance of Salvatore Panico, whose alleged inability to control himself made it likely, they say, that he would be a repeated offender. However, Rule 14 of the Federal Rules of Criminal Procedure vests in the trial judge broad discretion to determine whether, under given circumstances, the danger of substantial prejudice is

great enough to warrant a severance (*United States* v. *Schaffer*, 362 U.S. 511 (1960); *Opper* v. *United States*, 348 U.S. 84 (1954); *Dowling* v. *United States*, 249 F. 2d 746 (C.A. 5, 1957); *United States* v. *Haupt*, 136 F. 2d 661 (C.A. 7, 1943). Here that discretion was not abused. The trial judge reasonably concluded that Panico's behavior was not the uncontrollable product of mental illness, but rather a calculated performance staged for the purpose of inducing a mistrial. *United Stated* v. *Panico*, 308 F. 2d 125 (C.A. 2), pending on certiorari, No. 45, this Term. It was entirely appropriate, therefore, for the court to deny a severance which would have allowed Panico the fruits of his malfeasance, and to take precautionary measures, including the imposition of physical restraints, to protect the other defendants against possible prejudice by a recurrence of Panico's unruly behavior.

Nor did the court exceed its discretion in denying the motions for mistrial. The situation which confronted it was unparalleled. One trial had already been subverted. The second, after long delay, had scarcely commenced when it, too, was subjected to the same pressures. There was no reason to expect that a future trial of the same defendants, even with Panico excluded, would be allowed to proceed on a more orderly basis—or indeed that any trial could be completed at all unless the judge acted firmly and forced it to go forward.

To adopt a rule requiring a new trial every time one of the defendants in a joint trial hurls accusations at a co-defendant in the presence of the jury, would arm criminal defendants with a weapon of incalculable

danger to the judicial process. Such a rule would place a premium on courtroom defiance and would enable defendants to provoke a mistrial almost at will. The peril was recognized by the Second Circuit in *United States v. Aviles*, 274 F. 2d 179, certiorari denied, 362 U.S. 974, another case in which the defendant burst into a tirade of accusations against his co-defendants. Affirming the trial court's denial of a mistrial, the court of appeals declared (at 193):

> Manifestly it was not error to deny the mistrial motions. If such conduct by a co-defendant on trial were held to require a retrial it might never be possible to conclude a trial involving more than one defendant; it would provide an easy device for defendants to provoke mistrials whenever they might choose to do so. Under all the circumstances the trial judge's instructions adequately dealt with the situation and his denial of the mistrial motions was proper. * * *

It is plainly no answer to recommend, as some petitioners do, that the practice of joint trials, particularly in conspiracy cases, be discontinued. There are many reasons which make it highly undesirable to hold a separate trial for each member of a large criminal enterprise such as the one here. Such fragmenting would create the possibility of inconsistent treatment of defendants similarly situated. It would place a heavy burden, both of time and expense, upon a judicial system already critically congested. It would render even more difficult the provision of a prompt and speedy trial. Not least important, to require the government to produce its witnesses time and again would greatly magnify the already for-

midable difficulty of finding people courageous enough to risk life and limb by testifying against narcotics rings and other vicious racketeers. Often the safety of the witness is entirely dependent upon the government's ability to keep his identiy secret until the trial. Finally, the considerations which counsel against granting discovery in criminal cases equally militate against forcing the government to tip its hand in successive trials of the same conspiracy.

We are not unmindful of the serious possibility of "guilt by association" which is present whenever many defendants are tried in the same courtroom. In the instant case, the court did its utmost to minimize that possibility. It repeately cautioned the jury to disregard the extraneous interjections and to consider each defendant on his own merits as disclosed by the evidence. There is no reason to believe that those instructions were not followed. Cf. *Delli Paoli* v. *United States*, 352 U.S. 232. The trial was not unmanageable in size; of the original 29 defendants, only 14 were tried together. The actual presentation of the government's evidence—exclusive of objections, motions, and colloquies—consumed relatively little time. Most of the evidence relating to the petitioners came from the mouth of a single government witness. The judge's charge to the jury was compartmentalized with respect to the various defendants (Tr. 8776–8818). The jury deliberated at length and requested testimony, exhibits and re-reading of portions of the instructions in such a manner as to indicate a careful study of the case against each defendant (Tr. 8887, 8896, 8908, 8920, 8930, 8947, 8982, 8998–8999, 9001–9002). There was never any indication of disagree-

ment or deadlock among the jurors. Thus, the likelihood of prejudice to any petitioner who was not a party to the subversion of the trial—if there was any such petitioner—is plainly insufficient to warrant a reversal.

3. MEASURES TAKEN BY TRIAL COURT TO MAINTAIN ORDER

Petitioner Carmine Panico contends (Pet. in No. 359, pp. 35–38) that the trial judge deprived him of a fair trial by requiring that he be gagged at various stages in the proceeding. We submit that under the unprecedented circumstances of this case, the precautions taken by the court were eminently justified.

On May 23, immediately after his brother's assault upon the jury box and consequent remand into custody, Carmine, in open court, vilified the judge as "a lousy bum" and "a bastard." A few days later, the court ordered that Salvatore Panico be gagged and manacled after his outburst accusing codefendant Galante of being present at the Appalachin meeting. Carmine Panico thereupon threatened, "You better gag me too" (*supra*, p. 19). Recalling, no doubt, that a few days earlier the misconduct and reprimand of his brother had triggered an intolerable outburst by Carmine, the court prudently responded to the threat by imposing the same restraints upon Carmine. The gag employed, it should be added, was merely a cloth strip which covered the exterior of the mouth but did not fit inside it. Later, when Carmine Panico took the witness stand in his own behalf, the court removed the gag and indeed complimented him upon the good impression he had made upon the jury. But on June 7, after an ostensible attempt at suicide

by Salvatore in his prison cell (see Govt. Br. in Opp., *Panico* v. *United States*, No. 45, this Term, pp. 12–13), the court again took the precaution of ordering Carmine gagged. In light of experience, which showed that extreme action by Salvatore was apt to elicit an equally drastic reaction on Carmine's part, and in light of Carmine's hostile demeanor (disclosed by the record (Tr. 7372)), the court was warranted in adopting stern measures to forestall an eruption which might have prejudiced the other defendants and still further disordered the trial.

4. ALLEGED DENIAL OF RIGHT TO COUNSEL

The favorite device employed by the defendants in their campaign to halt or delay the trial was the claim, first by one and then by another, that he was not represented by counsel. In the first trial, defendant Sancinella had succeeded in winning a severance on this ground. *United States* v. *Bentvena*, 288 F. 2d 442, 446. During the ensuing period, various defendants were able to thwart for nearly a year Judge Murphy's efforts to hold an immediate retrial, by claiming inability to retain counsel—a maneuver they dared exploit notwithstanding the judge's threat to punish them for contempt.

The same dilatory tactic was employed at the second trial by several defendants, including petitioners Panico and Galante, who now urge upon this Court the same baseless contention, *i.e.*, that they were denied effective representation and the right to counsel of their own choice. Petitioner Panico originally retained as his counsel Mr. Albert C. Aronne. Shortly before trial, Aronne attempted to withdraw on the

ground that his appearance had been solely to answer the calendar and that he was not admitted to practice in the federal court. In view of the imminence of the trial, the court refused permission to withdraw and ordered that Aronne be admitted to practice, despite a plea by Salvatore Panico that his inexperience in federal court made him unacceptable to try the case. When Mr. Aronne was unable to appear at the beginning of the trial because of a conflicting commitment in a State court, the court appointed Mr. George Todaro, an experienced criminal attorney already familiar with the case from the previous trial. The Panicos rejected him, insisting that Mr. Aronne alone would be acceptable. But when the latter returned on April 11, the Panicos objected to him because he had not been present at the trial from the beginning. That objection was wholly groundless. For the court had ordered the prosecution not to put in evidence directly relating to the Panicos until their retained counsel had returned, and, accordingly, the testimony through April 11 pertained primarily to the substantive counts and not directly to the Panicos and their associates in the conspiracy. There was no want of skill or vigor in Mr. Aronno's representation. The interim appointment of Mr. Todaro for a brief period during which no significant evidence was introduced against petitioner plainly did not deprive him of the effective assistance of counsel or the right to choose his own attorney.

The similar contention of petitioner Galante is amply refuted by the court of appeals (Ormento Pet.

41a–42a) upon whose discussion of the issue we rely.

Petitioner Mancino protests that his counsel was afforded inadequate time to prepare for trial. On March 16, Mancino's attorney revealed a health condition not previously disclosed. The court assigned State counsel (Tr. 1167–1168) and adjourned the trial for two weeks, until April 2. Undoubtedly, the appointment placed a considerable burden on the newly appointed counsel. However, in view of the roadblocks which had obstructed the commencement of the proceeding for almost a year, it was clear that determined action by the trial court was essential if the trial was to be held at all. It cannot be said that the court's refusal to permit further delay was an abuse of discretion.

5. JOINDER OF SUBSTANTIVE AND CONSPIRACY COUNTS

The court of appeals reversed the convictions of three co-defendants (Bentvena, Monastersky, and Struzzieri) on both substantive and conspiracy counts. Relying upon that fact, petitioner Ormento (Pet. in No. 344, pp. 15–16) contends that certain evidence introduced to prove the substantive offenses pertained exclusively to those three defendants and was prejudicial to the defendants charged only with conspiracy. That contention is baseless. The evidence in question consisted of declarations by Cotroni (as reported by the witness Smith) that (a) he had supplied some of the narcotics seized at a raid at Hicksville (an incident involving the three above-named defendants); and (b) that narcotics he supplied carried a certain trademark on the envelope, a trade-

mark shown by other evidence to have been borne by the narcotics seized from the three defendants. The court of appeals reversed the conspiracy convictions of the three defendants, not on the ground that the evidence as to the substantive offenses was not probative of the conspiracy as well, but rather because the declarations of an alleged co-conspirator are inadmissible as hearsay in the absence of other evidence linking the defendants to the combination (Ormento Pet., 69a–70a). The court, by a divided panel, went on to reverse the convictions of the three defendants on the substantive counts on the ground that the jury may have been prejudiced against them after hearing the lenghty evidence relating to the conspiracy (Ormento Pet., 83a–86a).

However, the mere fact that the declarations of Cotroni were inadmissible as to the three above named defendants for want of independent evidence implicating them in the conspiracy does not mean that it was inadmissible against other defendants whose participation was firmly established by collateral proof. There can be no doubt that Cotroni's explanation as to how his narcotics could be identified, as well as the admission that he had supplied the narcotics seized in the Hicksville raid were relevant to the issue of conspiracy. The trial court properly instructed that the events charged in the substantive count might also be considered in the conspiracy count if the jury found they were committed in furtherance of the conspiracy (Tr. 8762). It correctly pointed out, moreover, that accomplishment of the objectives of a conspiracy is the most persuasive evidence of its existence (Tr. 8755).

We fail to see any way in which the petitioners could have been prejudiced by being tried together with the three defendants whose convictions were overturned—especially since, as the court of appeals noted (Ormento Pet. 86a), there was virtually no reference to these three after the first week of trial.

6. TESTIMONY BY UNITED STATES ATTORNEY

Suzanne Cadieux, a Canadian, had testified at the first trial that in November 1958 she was present at a restaurant in Montreal with severed defendants Robert, Cotroni, and Greco and co-defendant Mari. Following a long conversation between these parties which she did not hear, Mari was taken to the airport to fly to New York (Tr. 4028–4037). About a month later, Cadieux was present at a Montreal hotel with defendants Robert, Cotroni and Stepanoff. Petitioner Di Pietro was also present and told Cotroni of a deal he had made selling some heroin for $45,000. Later, at Cotroni's house in the Laurentian Mountains, Di Pietro turned over to Cotroni $47,000 (Tr. 4037–4047).

At the beginning of the second trial, Assistant United States Attorney Tendy told the court that extensive efforts to locate Cadieux in Canada had been unavailing and that she had executed a recantation of her former testimony. Defense counsel stated that they had encountered no difficulty in finding her (Tr. 3735). The court determined that the government was unable to bring Cadieux to the trial but felt that in the interests of justice her deposition should be taken and submitted to the jury in conjunction

with her testimony at the first trial (Tr. 3884–4011a). The court explained that the purpose of the deposition was to give defendants the opportunity to impeach the witness (Tr. 3973, 3985, 3987).

In her deposition, subsequently taken in Montreal, Cadieux alleged that Mr. Tendy had improperly attempted to induce the witness to testify favorably to the government and that the witness had eventually succumbed and given false testimony (Tr. 5419–4577a, especially 4520–4521, 4528). In rebuttal to this charge Mr. Tendy testified that he had made no promises to Cadieux and had believed her account (Tr. 4922–4929). The court instructed the jury that this testimony was not evidence that Cadieux had testified truthfully at the first trial, but was admitted solely for the purpose of determining whether the prosecution had suborned perjury. The jury was further told (Tr. 8830):

> If you believe that the prosecution did induce or use Cadieux's testimony, knowing that such testimony was false, you may conclude that the government was conscious that its case was weak and lacking in merit; that would be also true if you believed they thought that about offering her prior testimony on this trial. If you so conclude, you could find that these defendants are innocent men unjustly accused.

The court properly explained the purpose of admitting this testimony and did not make the verdict hinge upon the jury's belief in the testimony of the prosecutor. Far from prejudicing petitioners, this instruction gave them more than their due.

7. SUPPRESSION OF EVIDENCE

Motions were made at the first trial seeking to suppress narcotics, paraphernalia and money seized without warrant at the apartment of government witness Eula Brown, at the office of severed defendant Orlandino, at the residence of his brother, and at the "plant" of severed defendant Gellman. None of the defendants on trial have or claim any proprietary or possessory interest in the premises involved or in the items seized. The petitioners were therefore properly held not to be persons aggrieved under Rule 41(e). See *Wong Sun* v. *United States*, 371 U.S. 471, 492.[7]

8. SCIREMAMMANO INDICTMENT

Petitioner Sciremammano contends that his indictment should have been quashed on the ground that the evidence before the grand jury was insufficient. According to petitioner, the only evidence before the grand jury which related to him was Smith's testimony that narcotics had been delivered to a person named "Sol" who had a club foot. The short answer is that Smith's testimony was *not* the only evidence pertaining to this defendant. Another witness testified that he knew a man named Salvatore Sciremammano, that this man was ostensibly the manager of the Squeez-Inn Bar, and that he had a deformed foot. In addition, the witness was shown a photo-

[7] This it not a case like *Jones* v. *United States*, 362 U.S. 257, where the person challenging the seizure was lawfully on the premises at the time of the search, and where the government itself alleged possession as a basis for conviction.

graph of Scirehammano and immediately identified him as the person who managed and received narcotics at the Squeez-Inn. We have lodged a copy of the transcript of this testimony with the Clerk of the Court.

In any event, as this Court held in *Costello* v. *United States*, 350 U.S. 359, 363:

> If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. * * * An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. * * *

9. WIRETAPPING

Defendants introduced extensive evidence at the first trial to show that government testimony had been based upon information secured by wiretapping. The court of appeals, after reviewing this evidence, affirmed Judge Levet's conclusion that there was no indication whatever that knowledge obtained from taps has led directly or indirectly to the discovery of any of the evidence utilized by the government. Petitioner Galante suggests (Pet. in No. 368, p. 34) that his name might have been suggested to agents as a result of the taps and that Smith and Cadieux, who concededly had worked with the government for nine months before any wiretapping took place, may have fabricated their testimony about him accordingly.

Such unsupported speculation can scarcely cast doubt upon the careful factual findings of the trial judge.

10. CHARGE TO THE JURY

Petitioner Ormento contends (Pet. in No. 344, pp. 22–23) that the trial court failed to instruct the jury that knowledge of illegal importation of the narcotics was an essential element of the offense charged. However, at the beginning of the charge on conspiracy, the court ordered that the first four paragraphs of the conspiracy count be read to the jury. These paragraphs specifically defined the purpose of the alleged combination to unlawfully import narcotics into the United States and to deal in imported narcotics, knowing them to be illegally imported (Tr. 8750–8752). The court then read sections 173 and 174 of Title 21, advising the jury that they might "find those defendants guilty who joined the conspiracy with knowledge of its purposes" (Tr. 8756). The jury were further informed that a finding of guilt required a "knowing participation in a scheme having as an objective the importation of narcotics contrary to law" and that they must find "a mutual understanding to accomplish the broad objectives set out in the indictment" (Tr. 8766). In addition, the court instructed that "you must next decide, as to each defendant separately * * * whether the government has proved * * * that he knowingly and intentionally joined or became a member of the conspiracy with knowledge of its unlawful purpose" (Tr. 8770). Knowledge of the purposes of the conspiracy was repeatedly declared a prerequisite to a

finding of guilty (Tr. 8772–8773). These instructions adequately apprised the jury of the necessity that each defendant be aware that the purpose of the conspiracy was the unlawful importation of narcotics.

The distinction between the instructions in the present case and those in *United States* v. *Massiah*, 307 F. 2d 62, 70 (C.A. 2), certiorari granted (on other issues), 374 U.S. 805, is evident. Although the court in *Massiah* read to the jury the relevant portions of Sections 173 and 174, it told the jury that what the indictment charged was a violation of 18 U.S.C. 371, the general conspiracy statute. And while it enumerated the elements of that statute, it did not so much as mention that knowledge of illegal importation was a prerequisite to conviction. In other words, whereas the trial court in the instant case defined at the outset the object of the particular conspiracy charged in the indictment (illegal importation of narcotics) and then repeatedly stressed that each defendant must be found to have had knowledge of that object in order to be convicted, the court in *Massiah* merely instructed the jury as to the nature of conspiracy in general and then, without reading the indictment itself, made uninformative references to the conspiracy "charged in the indictment."

Petitioner Carmine Panico alleges other defects in the court's instructions (Pet. in No. 359, pp. 23–24). The court erroneously ruled, he suggests, that Smith was an accomplice as a matter of law, thereby taking away from the jury that factual issue. As the court of appeals pointed out, however (Ormento Pet., p. 49a), the trial judge did not hold that Smith was in fact an accomplice, but merely advised the jury that since

Smith had *admitted* to being an accomplice his testimony should be scrutinized with special caution. If anything, that instruction, which was not objected to, was unduly favorable to the defendants.

There was no "spotlighting," as claimed, of the failure of Salvatore Panico to take the stand. The court merely mentioned that five named defendants had taken the stand in their own behalf and that their testimony should be judged by the same standards as those applied to any other witness (Tr. 8727).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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